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No. 101.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THE UNITED STATES, PLAINTIFF IN ERROR,

v.

THE PAINE LUMBER COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

BRIEF FOR THE UNITED STATES.

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STATEMENT.

The United States filed its complaint in trover against the defendant on January 28, 1902, by which it claimed damages in the sum of $541.14 for timber and logs cut and removed from the Stockbridge and Munsee Indian Reservation in Wisconsin between the 1st day of January and the 1st day of April, 1899, and sold to the defendant company.

The answer of the defendant was filed March 31, 1902 (R., 3), in which it set up that the company in good faith bought and purchased of one Thomas Gardner the amount of basswood logs mentioned in the complaint, and 390 feet, board measure, of elm

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logs; that the said basswood logs were of the value of $5.25 per thousand feet, board measure, and the elm logs were of the value of $4.50 per thousand feet, board measure, and that said logs were in the possession of the said Thomas Gardner, who claimed and represented himself to be the sole and absolute owner thereof and entitled to sell the same and collect therefor for his own use and benefit.

The defendant, further answering, set up that during the early part of the year 1899, it in good faith bought and purchased of one Dan Davids the amount of pine logs mentioned in the complaint, which were then of the value of $6 per thousand feet, board measure, and that said logs were in the possession of said Davids, who claimed and represented himself to be the sole and absolute owner thereof and entitled to sell the same and collect therefor for his own use and benefit.

The defendant, further answering, alleged that on or about the 10th day of April, 1901, it paid to the plaintiff the sum of $271.37 in full satisfaction and accord of all the claims of the plaintiff contained or set out in its complaint, which payment was made by money deposited by the defendant in the National Bank of Oshkosh, Wis., to the credit of the Secretary of the Treasury of the United States, in the manner and form provided by law. This alleged defense seems not to have been pressed at the trial.

No replication or other pleading after the answer of the defendant is shown by the record.

On June 21, 1904, the parties filed the following stipulation of facts:

> It is hereby stipulated and agreed by the parties hereto, by their respective attorneys, that the following facts are admitted to be true for the purposes of this action, and the same may be offered in evidence by either party hereto as admitted and stipulated facts in the case for any and all purposes of this action.
>
> STATEMENT OF FACTS.
>
> That the timber and logs involved in this case, to wit, 7,500 feet of basswood, 6,500 feet of elm, 51,020 feet of pine, were cut in the winter of 1898–1899 from the east half of the northwest quarter of section No. thirty-five (35), in township No. twenty-eight (28) north, of range fourteen (14) east of the fourth principal meridian, and the northeast quarter of the southwest quarter of section twenty-one (21) in said township; that said land was a part of the eighteen (18) sections then and now constituting the Stockbridge and Munsee Reservation; that prior to said time and now there was and is what is commonly known and called a business committee of the headmen or councillors of said Stockbridge and Munsee Indians, and there was and is a party among them commonly called the Miller faction which denied the authority of such committee, and opposed it, but that such committee represented a large majority numerically of the Stockbridge and Munsee Indians, as well as a large majority of its councillors or headmen,

and that such committee had and has a chairman, a secretary, and three other members. That such business committee, claiming authority and right so to do, allowed the different members of the tribe, being of age and heads of families, to select certain particularly described lands, and such selections were made, and the said committee did allot such selections to the parties making the same. That among the selections and allotments so made as aforesaid was one by and to one Thomas Gardner, a member of said tribe of Stockbridge and Munsee Indians, his selection and allotment being the east half of the northwest quarter of section thirty-five (35), township twenty-eight (28), range fourteen (14). That among the selections and allotments so made as aforesaid was one by and to one Daniel Davids, a member of said tribe of Stockbridge and Munsee Indians, his selection and allotment being the northeast quarter of the southeast quarter of section twenty-one (21). And they each claimed the right to cut and dispose of the timber upon the said selections for any purpose and particularly for clearing purposes or for support of family, and the logs or timber hereinbefore referred to were by them cut from a part of their several selections under their claim thereto.

That the United States has never recognized such allotments as legal, although the said Stockbridge and Munsee Indians have insisted that the same were legal and valid allotments of such land and have claimed that they were made in accordance with and under

authority of the said treaties and arrangements between them and the United States.

That the defendant, after the cutting of said logs and timber, the said basswood and elm logs then being on Weed's Point in the county of Shawano, and off of said Indian lands, in good faith and for a valuable consideration purchased the same of said Thomas Gardner, he claiming then and there to be the owner thereof and entitled to dispose of the same; and after the cutting of said logs and timber purchased the said pine logs of said Daniel Davids in good faith and for a valuable consideration, he then and there claiming to be the owner thereof and entitled to sell the same.

It is further stipulated and agreed that if the defendant, on the facts and law herein stipulated and proved on the trial of this action, shall be held liable for the value of said logs and timber at the time of the taking thereof by it, or while the same are in its hands, that the sum of $566.28 shall be and hereby is fixed and agreed upon as the measure of damages therefor.

It is further stipulated and agreed that if the defendant, on the facts and law herein stipulated and proved on the trial of this action, shall be held liable for the value of said logs and timber at the time of the cutting thereof by the said Indians, or the value thereof at the time of the taking thereof by the defendant, less the additions in value made thereto by the said Indians in cutting, hauling, and banking the same, that then and

in that case the measure of damages therefor shall be and is hereby stipulated to be the sum of $379.59.

But such stipulation as to the measure of damages shall not affect or prejudice the right of the defendant to show or claim credit for the payment of any and all sums of money which it may, under the evidence, prove have been paid to the plaintiff therefor or should be credited thereon. (R., 6.)

On the same day an additional stipulation of facts was filed as follows:

It is hereby stipulated and agreed by the parties hereto, by their respective attorneys, that the following additional facts, over and above the facts recited in the stipulation already filed herein, are admitted to be true for the purposes of this action, and that this stipulation may be filed herein and the same effect given thereto as if said facts had been specifically proved upon the trial of this action.

It is stipulated that the timber involved in this action was cut at the time alleged in the complaint, respectively, by Thomas Gardner upon the east half of the northwest quarter of section 35, in township No. 28, north of range 14 east, and of Daniel Davids upon the northeast quarter of the southwest quarter of section 24, in said township; that each of the said Gardner and Davids was at the time of such cutting an Indian and a member of the Stockbridge and Munsie tribe of Indians, and that such timber was cut by them, respectively, upon their respective selections, or

pieces which they claimed as in the former stipulation recited, upon said Stockbridge and Munsie Indian Reservation, not for the purpose of cultivation, but for the support of their families, and that they cut it, claiming and believing that they had the right so to do; that said Davids had never resided upon his selection, and there was no house thereon, but that he was there temporarily at times; that at the time of the cutting of the timber in question by said Gardner he was living upon his selection; that shortly thereafter his wife died, and that he has never lived upon his selection since, except at intervals of two or three months at a time; that this action was commenced by the service of process upon the Paine Lumber Company on February 3, 1902; that on the 10th day of April, 1901, the defendant deposited to the credit of the Secretary of the Treasury special account No. 5, $271.37, as an offer of settlement for the logs purchased from the Stockbridge and Munsie Indian Reservation, being the logs involved in this suit, and that such deposit and payment was made by the defendant in accordance with its offer to settle the matters involved in this case for such sum, to be then paid the Government of the United States in accordance with such offer, and that of such sum no part thereof has ever been returned to the defendant, though thereafter and on or about the 17th day of March, 1902, the Government, through its attorney in this case, sent to the attorney for the defendant herein Treasury warrant No. 684 for the sum of

> $271.37, being the same amount which had been sent by the defendant to the plaintiff, as hereinbefore stated, which amount the defendant then and there refused to accept; that the amounts specified as the measure of damages in the stipulation already filed herein include the costs of the Government in estimating the amount of the timber alleged to have been unlawfully cut upon said selections. (R., 8.)

On the same day the parties stipulated and agreed to waive a trial by jury, and the case was heard by the court upon the foregoing stipulated facts.

The court found the issue in favor of the defendant, and filed findings of fact and conclusions of law, which here follow (R., 10):

FINDINGS OF FACT.

1.

That the defendant is and was during all the times mentioned in the complaint a duly incorporated Wisconsin corporation.

2.

That long prior to the commencement of this action and long prior to the acts alleged in the complaint the head men or council of the Stockbridge and Munsee Indians, claiming authority so to do under the treaties and arrangements with the United States, allotted to one Thomas Gardner the east half of the northwest quarter of section thirty-five (35), township twenty-eight (28), range fourteen (14) east of the fourth principal meridian,

of the State of Wisconsin, and to one Daniel Davids the northeast quarter of the southeast quarter of section twenty-one (21), township twenty-eight (28), range fourteen (14) east of the fourth principal meridian, of the State of Wisconsin, said lands being a part of the tract of land given to the Stockbridge and Munsee Indians by the treaty of 1856, each of said Indians being a member of said tribe of Stockbridge and Munsee Indians and the head of a family, and the said allotments being made to them, respectively, as their separate and individual allotments, and being the same lands described in the complaint herein.

3.

That thereupon Thomas Gardner and Daniel Davids entered into immediate possession of their respective allotments, and each of them has ever since claimed to hold the same as his allotment, and has constantly asserted his ownership and right to take the timber therefrom, without restrictions, under the said treaty and arrangements with the plaintiff.

4.

That no patent has ever been issued for either of said parcels of land, and that the ownership of the same by said Indians has received no official sanction on the part of the plaintiff, aside from the recognition of their respective rights to the occupancy of the parcels so claimed and held by them respectively, as aforesaid.

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And that their respective rights to the occupancy of their respective parcels of land allotted to them, as aforesaid, has been recognized by the United States.

5.

That the timber and logs involved in this case, to wit, 7,500 feet of basswood, 6,500 of elm, and 51,020 feet of pine, were cut in the winter of 1898–1899, upon said respective parcels of land, by the said Thomas Gardner and the said Daniel Davids, respectively, not for the purpose of clearing the land for cultivation, but for the purpose of providing means for the support of their families, and that such cutting by each of them was done in good faith, and each of them claiming and believing that he had the right to so cut for said purpose.

6.

That after said cutting, and in the summer of 1899, at Weeds Point, in the county of Shawano, Wisconsin, the said logs were bought by the defendant of said Thomas Gardner and Daniel Davids, the same then and there being at said Weeds Point and off of the said reservation, for a valuable and fair consideration.

7.

That the defendant bought the same in good faith, believing the said Thomas Gardner and the said Daniel Davids were the bona fide and absolute owners thereof, and that they respectively were lawfully entitled to sell the logs cut from their respective allotments.

8.

That at the time of the cutting of the timber in question the said Thomas Gardner was living upon his said allotment; that shortly thereafter his wife died, and that he has not since lived thereon, except at intervals of two or three months at a time, but for the most part has lived elsewhere with his brother.

9.

That at the time of said cutting the said Daniel Davids had no house on his allotment and was only there at times temporarily.

It is stipulated in this case that if defendant is liable for the value of the logs and timber at the time of taking or while in his hands that the measure of damages therefor be the sum of five hundred and sixty-six dollars and twenty-eight cents ($566.28), and that if it be liable for the value of said logs and timber at the time of the cutting thereof or at the time of the taking thereof by the defendant, less the additions in value made thereto by the Indians in cutting, hauling, and banking the same, then the measure of damages therefor shall be the sum of three hundred and seventy-eight dollars and fifty-nine cents ($378.59). The measure of damages in both cases includes the cost of the scale and estimate thereof made by the Government officials.

CONCLUSIONS OF LAW.

That the said Thomas Gardner and the said Daniel Davids, as such allottees, had the right to cut and sell the timber on their respective

allotments for the purpose for which the same was cut and sold, and that the defendant is entitled to judgment herein in its favor and against the plaintiff, dismissing the plaintiff's complaint on the merits, but without costs.

Let judgment be entered accordingly.

Thereupon the United States attorney filed exceptions to the court's conclusions of law as follows (R., 12):

First. The plaintiff excepts to the said entire conclusion of law, for the reason that said conclusion of law is an erroneous conclusion of law upon the facts as found by the court, and is not warranted by the facts as found, and that the same is contrary to law.

Second. It specifically excepts to that part of the conclusion of law which reads as follows: "That the said Thomas Gardner and the said Daniel Davids, as such allottees, had the right to cut and sell the timber on their respective allotments for the purpose for which the same was cut and sold," for the reason that said conclusion of law is contrary to law and not warranted by the facts as found.

Third. To that part of the conclusion of law which is that the defendant is entitled to judgment herein in its favor and against the plaintiff, dismissing the plaintiff's complaint on the merits, for the reason that the same is contrary to law, is not sustained by the facts and is an erroneous conclusion of law upon the facts as found.

Fourth. The plaintiff specifically excepts to the order of the court ordering judgment in

favor of the defendant in said action, as such order is contrary to law and to the facts as found.

Fifth. It specifically excepts to the failure of the court to find that the plaintiff is entitled to judgment against the defendant for the value of the timber as found by the findings of fact, with costs, and to the court's failure to order such judgment.

Sixth. It specifically excepts to the court's failure to find as a conclusion of law upon the facts as found that the allottees, Thomas Gardner and Daniel Davids, had no right to cut and sell the timber on their respective allotments for the purpose for which the same was cut and sold, as set forth in the findings of fact, and that the defendant company acquired no title to the timber purchased by it from the said allottees, and that the said defendant company is liable to the plaintiff for the value of such timber, as found in the findings of fact, at the time it was purchased by the said company from the said allottees, Thomas Gardner and Daniel Davids, with costs.

Seventh. It specifically assigns as error the entire conclusion of law as made by the court and further specifically assigns as error the failure of the court to find as a conclusion of law that the said allottees had no right to cut the timber for the purposes as found and had no right to sell the same, and for its failure to find that the defendant company by its purchase of said timber acquired no legal title thereto, and for the court's failure to find as

conclusion of law that the defendant is indebted to the plaintiff for the value of the timber, as found by the findings of fact, together with costs, and for its failure to order judgment in favor of the plaintiff and against the defendant for the value of the timber, as found, with the costs.

The court's opinion will be found commencing at page 14 of the record. The assignments of error will be found commencing at page 18 of the record.

It appears that Thomas Gardner and Dan Davids, who sold the timber and logs to the defendant company, are Stockbridge and Munsee Indians; that they cut the timber and logs upon what they claim as their selections or allotments under the treaties with the Stockbridge and Munsee Indians and the acts of Congress relating thereto; that these selectors or allottees claimed the right to cut the timber for the purposes of sale, and that the defendant company, claiming that it believed the Indians had the right so to cut and sell, purchased the timber and logs from these two allottees. Thus the court will see that the issue in the case is the character of the title of Gardner and Davids and whether that title is sufficient to support the cutting of timber for commercial purposes.

Since the case was docketed in this court we have obtained through the Interior Department some additional facts as to these two allotments and have concluded that Thomas Gardner was within his legal rights in cutting and selling the timber, and we do not, therefore, press this writ of error so far as the

timber cut upon the allotment of said Gardner is concerned. As to that cut upon the selection or allotment of Davids, however, we stand upon the record and proceed to argue the case with the object of having the judgment of the court below reversed in so far as the timber cut upon Davids' selection is concerned.

The amount of money involved in the controversy now before the court will be found to be comparatively small. The case is pressed principally for the reason that there are several cases involving large amounts of money awaiting the decision of this court.

As the case involves the construction of a treaty it was brought directly to this court.

ARGUMENT.

It is necessary to review the treaty of 1856 and subsequent legislation before proceeding to the argument proper, and these will be considered in chronological order.

THE TREATY OF 1856. (11 ST., 663.)

The treaty with the Stockbridge and Munsee Indians of February 5, 1856, will be found in the 11th Statutes at Large, page 663. It commences with a recital of the original cession to the Stockbridge and Munsee tribe and subsequent retrocessions by the tribe to the United States. It further recites a history of these tribes, their dissensions, difficulties and vicissitudes, and that the treaty to be made is for the purpose of relieving the Indians of these com-

plicated conditions and to establish them comfortably together under the paternal care of the United States Government, and for the further purpose of enabling such individuals of the tribe as are qualified to manage their own affairs to exercise the rights and to perform the duties of the citizen.

The treaty proper, after providing for the retrocession by the Stockbridge and Munsee tribe of certain lands theretofore set aside for the use of the Stockbridge and Munsee Indians in the treaty with the Menominees of February 8, 1832, the relinquishment of $20,000, and $16,500 additional, invested by the United States in stocks for the benefit of the Stockbridge tribe, in conformity to article 9 of said treaty and all claims set up by and for the Stockbridge and Munsee tribe, or by and for the Munsees separately, or by and for any individuals of the Stockbridge tribe to certain annuities, and all such and other claims set up by or for them or any of them, provides as follows:

> ARTICLE II. In consideration of such cession and relinquishment by said Stockbridges and Munsees, the United States agree to select, as soon as practicable, and to give them a tract of land in the State of Wisconsin near the southern boundary of the Menomonee Reservation of sufficient extent to provide for each head of a family and others lots of land of eighty and forty acres, as hereinafter provided; every such lot to contain at least one-half of arable land, and to pay—to be expended for improvements for the said

Stockbridges and Munsees, as provided in Article IV—the sum of forty-one thousand one hundred dollars; and a further sum of twenty thousand five hundred and fifty dollars to enable them to remove.

ARTICLE III. As soon as practicable after the selection of the lands set aside for these Indians by the preceding article, the United States shall cause the same to be surveyed into sections, half and quarter sections, to correspond with the public surveys, and the council of the Stockbridges and Munsees shall, under the direction of the Superintendent of Indian Affairs for the northern superintendency, make a fair and just allotment among the individuals and families of their tribes. Each head of a family shall be entitled to eighty acres of land, and in case his or her family consists of more than four members, if thought expedient by the said council, eighty acres more may be allotted to him or her; each single male person above eighteen years of age shall be entitled to eighty acres; and each female person above eighteen years of age, not belonging to any family, and each orphan child to forty acres; and sufficient land shall be reserved for the rising generation.

After the said allotment is made, the persons entitled to land may take immediate possession thereof, and the United States will thenceforth and until the issuing of the patents, as hereinafter provided, hold the same in trust for such persons; and certificates

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shall be issued, in a suitable form, guaranteeing and securing to the holders their possession and an ultimate title to the land; but such certificates shall not be assignable and shall contain a clause expressly prohibiting the sale or transfer by the holder of the land described therein. After the expiration of ten years, upon the application of the holder of such certificate, made with the consent of the said Stockbridge and Munsee council, and when it shall appear prudent and for his or her welfare, the President of the United States may direct that such restriction on the power of sale shall be withdrawn and a patent issued in the usual form.

Should any of the heads of families die before the issuing of the certificates or patents herein provided for, the same shall issue to their heirs; and if the holder of any such certificate shall die without heirs, his or her land shall not revert to the United States, unless on petition of the Stockbridge and Munsee council for the issuing of a new certificate for the land of such deceased person to the holder of any other certificate for land; and on the surrendering to the United States of such other certificate by the holder thereof the President shall direct the issuing of a new certificate for such land; and in like manner new certificates may be given for lots of land the prior certificates for which have been surrendered by the holders thereof.

The character of the title of the Indians who took allotments under this treaty must be determined

from the second paragraph of Article III. It is therein provided that the persons entitled to land, after receiving their allotments, may take immediate possession thereof and that the United States will thenceforth and until the issuing of patents, as thereinafter provided, hold the same *in trust* for such persons and certificates shall be issued, in a suitable form, guaranteeing and securing to the holders their possession and an *ultimate* title to the land; such certificates *shall not be assignable* and shall contain a clause expressly prohibiting the sale or transfer by the holders of the land described therein. After the expiration of ten years the holder of such certificate, with the consent of the Stockbridge and Munsee council, may apply for the withdrawal of the restriction on the power of sale, and, if it shall appear prudent, the President of the United States may direct such withdrawal and a patent shall be issued in the usual form.

The third paragraph of Article III provides that if any of the allottees shall die before the issuance of certificates or patents, the same shall be issued to their heirs, and if the allottee shall die without heirs the land shall not revert to the United States except for the purpose of exchange with some other holder of a certificate.

It is evident that the commissioner on the part of the United States and the sachem who executed this treaty on behalf of the tribe were by no means confident that the treaty would effectively reach all of

the difficulties with which the tribe were then confronted and that it was, to a certain extent, experimental, for by Article XI of the treaty it is provided:

> The object of this instrument being to advance the welfare and improvement of said Indians, it is agreed, if it prove insufficient from causes which can not now be foreseen, to effect these ends, that the President of the United States may, by and with the advice and consent of the Senate, adopt such policy in the management of their affairs, as in his judgment may be most beneficial to them; *or Congress may hereafter make such provisions by law as experience shall prove to be necessary.*

That the promise and guarantee to the allottees of an ultimate title to the land was improvidently made is evident from the provisions of the act of February 6, 1871, which we shall proceed to discuss.

THE ACT OF FEBRUARY 6, 1871 (16 ST., 404).

The first section of the act of February 6, 1871, provides that the two townships of land situated in the county of Shawano, State of Wisconsin, set apart for the use of the Stockbridge and Munsee tribe of Indians, shall, under the direction of the Secretary of the Interior, be examined and appraised in 80-acre lots according to public survey.

The second section provides for the advertisement for sale at public auction of said two townships and provides for the manner and place of sale. The proviso of section 2 is important, and is as follows:

> *Provided, however,* That the Secretary of the Interior is hereby authorized to reserve from

> sale a quantity of said lands not exceeding eighteen contiguous sections, *embracing such as are now actually occupied and improved*, and are best adapted to agricultural purposes, subject to allotment to members of the Indian party of said tribe as hereinafter provided.

Section 3 provides for the application of part of the proceeds of the sale of said lands to the expenses of the appraisal and sale.

Section 4 provides that the amount remaining after the expenses of the appraisal and sale shall be paid shall be added to other amounts due from the United States to the Indians.

Section 5 provides for the division of the amount found to be due the tribes, and then follows this proviso:

> *Provided, however*, That a part of said sum due the Indian party, not exceeding $30,000, may, on the request of the sachem and councilors of said tribe, be expended in securing a new location for said tribe and in removing and aiding them to establish themselves in their new home; and in case of their procuring and removal to such new location at any time, the said eighteen sections of land reserved for their use by the second section of this act shall be sold in the manner therein provided, and the proceeds thereof be placed to their credit as aforesaid.

Desiring to abrogate the promise of an ultimate title by patent made in the treaty of 1856, and pursuant to the authority granted by Article XI of the

treaty, Congress then, by sections 8 and 9 of the act of 1871, provided as follows:

> SEC. 8. *And be it further enacted*, That as soon as practicable after a suitable and permanent reservation shall be obtained and accepted by said tribe, *either at their present home or elsewhere*, the same shall, under the direction of the Secretary of the Interior, be surveyed and subdivided to correspond with the public survey, and the council of said tribe, under the superintendence of the agent of the United States, shall make a just and fair allotment of so much thereof (in compact form) as may be required among the individuals and families composing said tribe, as follows: Each head of a family consisting of four persons shall receive eighty acres of land, and if consisting of more than four persons, at the discretion of the council, eighty acres more may be assigned to him or her; each male person above the age of eighteen years, not included in any family, shall receive eighty acres; each female person above the age of eighteen years, not a member of any family, and each orphan child, shall receive forty acres; the lands assigned and allotted as aforesaid *shall be held inalienable*, and in case of the death of any person his or her right thereto shall descend to his or her heirs, if members of said tribe, and if he or she dies without heirs capable of inheriting the land shall revert to and become the common property of said tribe; there shall also be set apart and appropriated a lot, not exceeding forty acres, to be held

as common property, on which to erect a church, parsonage, schoolhouse, and other improvements necessary for the accommodation of said tribe: *Provided*, That if any female shall marry out of said tribe she shall thereby forfeit all right to hold any of said lands as if deceased.

SEC. 9. *And be it further enacted*, That the allotments contemplated in the previous sections of this act shall be made and a certified copy thereof returned to the Commissioner of Indian Affairs within one year after the reservation shall have been made and accepted by said tribe; and thereafter the title of the lands described therein *shall be held by the United States in trust for individuals* and their heirs to whom the same were allotted. The surplus lands embraced in such reservation remaining after making such allotments shall be held *in like manner by the United States*, subject to be allotted to individuals of said tribe who may not have received any portion of said reservation, or to be disposed of for the common benefit of said tribe: *Provided*, That no change or addition shall be made in the allotment returned to the Commissioner of Indian Affairs unless the same shall be approved by the Secretary of the Interior.

And, independently of the authority of Article XI of the treaty, Congress had a right to modify or repeal the treaty by legislative action. (*Thomas* v. *Gay*, 169 U. S., 264; *Stephens* v. *Cherokee Nation*, 174 U. S., 445; *Lone Wolf* v. *Hitchcock*, 187 U. S., 553.)

It is apparent that while some locations were made under the treaty of 1856, no certificates guaranteeing to the selectors an ultimate title to the land were issued. The proviso of section 2 of the act of 1871 reserved from sale eighteen contiguous sections of land, "*comprising such as are now actually occupied and improved,*" and it was these eighteen sections a survey and subdivision of which are provided for by section 8 of the act. That section and section 9 take up the eighteen contiguous sections of land and provide for the distribution thereof and the manner in which the land shall be held. The act abrogates the promise of a title by patent contained in the treaty, and provides that the land distributed shall be held *inalienable,* and section 9 provides that the land *shall be held by the United States in trust for individuals* and their heirs to whom the same were allotted. It is further provided by that section that the surplus land remaining after the allotments shall be made shall be held in like manner by the United States for the benefit of the tribe.

If any certificates guaranteeing title had been issued under the treaty, they would have been rendered null and void by the act of 1871, for it is not likely that Congress would have discriminated in such a material matter between the Indians who had taken allotments under the treaty of 1856 and those who had not done so but who were entitled to allotments under the act of 1871. After the passage of the act of 1871, therefore, all selections, whether made before or after the passage of that act, stood

upon the same basis, namely, that established by the act. The lands were to be held inalienable and the United States was to hold them in trust for the individuals and their heirs. And so with the surplus lands which were unallotted.

The seeming hardship of this legislation is explained by the act of March 3, 1893 (27 St., 744), by which Congress granted to all Stockbridge and Munsee Indians who had adopted the habits of civilized life and who had shown themselves capable of managing their own property an absolute title in fee simple, thus going far beyond the contemplation of the treaty of 1856, the provisions of which the act of 1871 had in part abrogated.

THE ACT OF MARCH 3, 1893 (27 St., 744).

The act of 1893 recites the treaty of 1856, and further recites the fact that by the interpretation placed by Government officials upon the act of 1871, many of the Indians had been excluded from participating in tribal funds and the right to occupy the reservation, and then proceeds to declare what Indians were entitled to a share in the funds and lands. The provision of the act of 1893 to which attention is invited, is contained in the last clause of the first section of the act. The first section in full is as follows:

> That all persons who were actual members of said tribe of Indians at the time of the execution of the treaty of February fifth, eighteen hundred and fifty-six, and their descendants, and all persons who became members of the

It is apparent that while some locations were made under the treaty of 1856, no certificates guaranteeing to the selectors an ultimate title to the land were issued. The proviso of section 2 of the act of 1871 reserved from sale eighteen contiguous sections of land, "*comprising such as are now actually occupied and improved,*" and it was these eighteen sections a survey and subdivision of which are provided for by section 8 of the act. That section and section 9 take up the eighteen contiguous sections of land and provide for the distribution thereof and the manner in which the land shall be held. The act abrogates the promise of a title by patent contained in the treaty, and provides that the land distributed shall be held *inalienable,* and section 9 provides that the land *shall be held by the United States in trust for individuals* and their heirs to whom the same were allotted. It is further provided by that section that the surplus land remaining after the allotments shall be made shall be held in like manner by the United States for the benefit of the tribe.

If any certificates guaranteeing title had been issued under the treaty, they would have been rendered null and void by the act of 1871, for it is not likely that Congress would have discriminated in such a material matter between the Indians who had taken allotments under the treaty of 1856 and those who had not done so but who were entitled to allotments under the act of 1871. After the passage of the act of 1871, therefore, all selections, whether made before or after the passage of that act, stood

upon the same basis, namely, that established by the act. The lands were to be held inalienable and the United States was to hold them in trust for the individuals and their heirs. And so with the surplus lands which were unallotted.

The seeming hardship of this legislation is explained by the act of March 3, 1893 (27 St., 744), by which Congress granted to all Stockbridge and Munsee Indians who had adopted the habits of civilized life and who had shown themselves capable of managing their own property an absolute title in fee simple, thus going far beyond the contemplation of the treaty of 1856, the provisions of which the act of 1871 had in part abrogated.

THE ACT OF MARCH 3, 1893 (27 St., 744).

The act of 1893 recites the treaty of 1856, and further recites the fact that by the interpretation placed by Government officials upon the act of 1871, many of the Indians had been excluded from participating in tribal funds and the right to occupy the reservation, and then proceeds to declare what Indians were entitled to a share in the funds and lands. The provision of the act of 1893 to which attention is invited, is contained in the last clause of the first section of the act. The first section in full is as follows:

> That all persons who were actual members of said tribe of Indians at the time of the execution of the treaty of February fifth, eighteen hundred and fifty-six, and their descendants, and all persons who became members of the

> tribe under the provisions of article six of said treaty, and their descendants, who did not in and by said treaty, and have not since its execution, separated from said tribe, are hereby declared members of said Stockbridge and Munsee tribe of Indians and entitled to their pro rata share in tribal funds and in the occupancy of tribal lands; *and all members who entered into possession of lands under the allotments of eighteen hundred and fifty-six and of eighteen hundred and seventy-one, and who by themselves or by their lawful heirs have resided on said lands continuously since, are hereby declared to be owners of such lands in fee simple, in severalty, and the Government shall issue patents to them therefor.*

It is convenient to explain to the court at this point why the Government does not press this case here so far as the timber and logs cut upon the selection of Thomas Gardner are concerned. Under the state of the record the Department of Justice was uncertain whether Thomas Gardner was within the provisions of the foregoing section, the stipulation of facts not clearly indicating his status. The facts as to his selection and residence thereon were ascertained through the Interior Department after the record reached this court, and as those facts indicate that Gardner is fairly within the act of 1893, it was decided to drop the case so far as the timber cut from his selection is concerned.

As stated earlier in the brief, however, the Government contends that Davids is not within the act of 1893 and that his title is only such as can be read out

of the treaty of 1856 and the act of 1871, and we shall now consider the question as to what was the exact character of that title and whether it is sufficient to support the cutting and sale of timber for commercial purposes. The record is defective in failing to show the date of the selection of Davids. For the convenience of the court the material portions of the stipulation of facts bearing upon this point will be quoted:

> That prior to said time (of institution of suit) and now there was and is what is commonly known and called a business committee of the headmen or councillors of said Stockbridge and Munsee Indians, and there was and is a party among them commonly called the Miller faction, which denied the authority of such committee and opposed it. But that such committee represented a large majority numerically of the Stockbridge and Munsee Indians. * * * That such business committee, claiming authority and rights so to do, allowed the different members of the tribe, being of age and heads of families, to select certain particularly described lands, and such selections were made, and the said committee did allot such selections to the parties making the same. * * * That among the selections and allotments so made as aforesaid was one by and to one Daniel Davids. * * * That the United States has never recognized such allotments as legal, although the said Stockbridge and Munsee Indians have insisted that the same were legal and valid allotments of such land, and have claimed that they were made in accordance with and under authority

> of the said treaties and arrangements between them and the United States (R., 7). * * * That said Davids had never resided upon his selection and there was no house thereon, but that he was there temporarily at times.

The court will see that it is impossible to determine from the record the date of Davids' selection. Whether it was before or after the act of 1893, however, makes no difference. If before the act of 1893, the stipulation of fact as to his nonresidence precludes him from enjoying the benefits of the act. If after, he was in the class of Indians who had not, up to that time, demonstrated their fitness for a title in fee simple and absolute control of their land by forsaking their nomadic and unstable habits and establishing a permanent home. At a later date, however, June 21, 1906 (34 Stat., 382), Congress decided to give all members of the tribe a fee-simple title in their allotments. It is the title as it stood at the time the timber was cut which we are to consider.

The court will observe that by both the treaty and the act of 1871 the allotments were to be made under the superintendence of the Indian agent. The stipulation of facts fails to show that this allotment to Davids was so made, but it is believed that as the Indians have done all on their part that they were required to do—and the Indian Department must have had knowledge through its agent that these allotments were being made—we should not contend here that this superintendence by the Indian agent should be held a *sine qua non*.

Under the treaty of 1856 and the act of 1871 the Indians had a mere right of occupancy in their lands.

The trial judge held that under the terms of the treaty, in part above quoted from, the policy of the earlier treaties with the Indians to reserve to them the mere right of occupancy in the lands upon which they lived was changed to intend an ultimate title in fee simple; that pending the patent, while the legal title is in the United States, the allottee was vested with the equitable title contemplated by the treaty, unless modified by a subsequent act of Congress or by concurrent action of the President and Senate; that the provision in restraint of alienation in the meantime is not inconsistent with a fee-simple estate; that while the Government's policy for the protection and control of the Indians is entirely within the power of the political department and beyond the sphere of judicial cognizance, no legislation abrogating or abridging the terms of the Stockbridge and Munsee treaty can be found, and that the terms of the treaty must control the issue in this case.

It is a curious fact that in his review of the treaty and subsequent legislation the learned trial judge seems not to have considered the act of 1893. It is equally strange that he should have held that the treaty has never been abridged by subsequent legislation when the act of 1871 so plainly had that effect. It will be remembered that the tract of land set aside for the tribe by the treaty was in lieu of the tract which had theretofore been given the tribe by the Menominee treaty, which tract was retroceded by the

treaty of 1856. It was provided that the selectors might take immediate possession of their selections and that until the issuance of patents the United States would hold the lands in trust for such selectors, and that certificates guaranteeing their possession and a title were to be issued to them. Apparently but little was done under this treaty, for the act of 1871 provided for a survey as soon as practicable after a suitable and permanent reservation should be obtained and accepted by the tribe *either at their present home or elsewhere.* The lands allotted were to be held *inalienable* and were to be held by the United States in trust for the individuals and their heirs. The surplus lands were to be held in like manner for the benefit of the tribe.

The history and the evolution of the policy of the Government respecting the Indian tribes are too well known to the court to require an elaborate discussion. While that policy has been to extend their right of occupancy in the lands granted to them by treaty or statute to a fee-simple title it will not be denied that the Government has always approached the question of a title of the latter character, with no restraint upon alienation, with extreme caution. As the guardian of the Indians and with a due regard to its obligations and responsibilities as such, the Government has awarded to each tribe and the members thereof only such title as their state of enlightenment would justify. This policy was adopted at an early date with the object of protecting the Indians from their own improvident habits and from the dissipation of their

property which would probably result from untrammeled negotiation with the commercial world.

The title of these Indians can not be determined by the application of the common law rules of real property or the doctrine of trusts and uses as found in that law and its modifications under the Statute of Uses. The question must be determined in the light of the history of each tribe, the general policy of Congress with respect to the Indians, and its intention as gleaned from the treaties and laws relating to each tribe. As said by this court in *Jones* v. *Meehan* (175 U. S., 1):

> The treaty must therefore be construed not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.

The treaty and the act of 1871 contain the word "trust" as defining the relation between the Government and the Indians. This trusteeship, however, is a mere substitution for the guardianship exercised over the tribe prior to the date of the Stockbridge and Munsee treaty (19 Op. Atty. Genl., 232).

In the earliier days of the Government the Indians were never given anything more than a right of occupancy in their lands. It is doubted whether the Government, in its original negotiation with any tribe, ever granted any greater title. (*Johnson* v. *McIntosh*, 8 Wheat., 574.) At the time that case was decided and for a long time thereafter the dis-

position of the Indians was such that they were liable to abandon their lands at any time, whereupon the possession attached itself to the fee without any grant or cession by the Indians. While the use of the lands by the Indians was confined to hunting, the Government at all times was willing to permit them to cut timber for agricultural or domestic purposes or for the purpose of improving the land. Indeed, this was encouraged, but it was never conceived that there was any permission to cut and sell timber to the white man, under such conditions as might be agreed upon, without the sanction of the Government.

The case of the *United States* v. *Cook* (19 Wall., 592), decided in 1873, holds that the presumption is against the authority of the Indians to cut and sell the timber, and that every purchaser from them is charged with this notice of presumption, and to maintain his title it is incumbent upon him to show that the timber was rightfully taken from the land. In that case the timber was cut upon the land reserved for the Oneida Indians, and the provision of the treaty as to tenure is "as other Indian lands are held." The act of 1871, relating to the Stockbridge and Munsee tribe, contains no habendum clause stronger than that in the Oneida treaty. In both cases a reservation of certain land is made for the Indians and in the case of the Stockbridge and Munsee tribe a further provision is made for partition of the lands among the individual members of the tribe. The treaty of 1856 gave them the right to immediate

possession of the lands, and both that treaty and the act of 1871 declared that the lands should be held inalienable.

If, in the early days, an Oneida Indian had abandoned his land and had shown no intention of adopting the habits of civilized life, the right of possession on the part of the Government would have attached itself to the fee which it had retained. Similarly, if a Stockbridge and Munsee Indian who had taken land under the treaty of 1856 and the act of 1871 had abandoned his land prior to the act of 1893, he would have forfeited all right to his allotment and the Government would have thereupon held the land in trust for the common use of the tribe. Prior to the act of 1893 these Indians had no greater title than did the Oneida Indians. That title was a mere right of occupancy. That the land could not be sold is perfectly clear. How, then, could the timber, which while standing is a part of the realty, be rightfully cut and sold? We quote from the Cook case:

> The timber while standing is a part of the realty, and it can only be sold as the land could be. The land can not be sold by the Indians, and consequently the timber, until rightfully severed, can not be. It can be rightfully severed for the purpose of improving the land or the better adapting it to convenient occupation, but for no other purpose. When rightfully severed it is no longer a part of the land, and there is no restriction upon its sale. Its severance under such circumstances is, in effect, only a legitimate use of the land.

It follows from this decision that as long as the land itself is inalienable the sale of the timber is likewise prohibited.

Since the case at bar was tried the Circuit Court of Appeals for the Ninth Circuit has decided the case of *United States* v. *Gardner* (133 Fed., 285). That case involved the right of the Indians to cut and sell, for commercial purposes, timber upon lands allotted to them in severalty under the general allotment act of February 8, 1887 (24 Stat., 388), which provides that the United States shall hold such lands in trust for the allottee or his heirs for the period of twenty-five years, or so much longer as the President may determine, and then convey the same in fee to such allottee or his heirs. It will be observed that the Indians entitled to the benefit of the act of February 8, 1887, had an absolute promise of a title in fee simple after the lapse of twenty-five years, subject to an extension of the time by the President. This is practically the same title as that contemplated by the Stockbridge and Munsee treaty of 1856.

Certainly the title of the Stockbridge and Munsee Indians is no greater than that taken under the act of 1887. And as to the Indians who took under the act of 1887, the Circuit Court of Appeals held that the Indians had no right to cut and sell timber from their allotments, basing its decision upon the case of the *United States* v. *Rickert*, 188 U. S., 432, in which this court was called upon to consider what interest, if any, the Indian allottee acquired in the land allotted to him under the act of 1887. The court specifically held that the United States retained the legal title to

such lands; that the only right the Indians had in the lands was that of occupancy; and that the lands were not subject to State or local taxation. Quoting from the Gardner case (p. 288):

> The court (Supreme Court in Rickert case) further adverted to the facts that the lands are held by the United States in execution of its plans relating to the Indians without any right in the latter to make contracts in reference thereto, or to do more than occupy and cultivate them; that the Indians are yet wards of the nation, in a condition of tutelage or dependency; that they occupy the lands with the consent and authority of the United States, and under a national policy by which the Indians are to be maintained, as well as prepared for assuming the habits of civilized life and citizenship, in view of which considerations "there arises the duty of protection, and with it the power." The principles announced in that case are decisive of the present case and lead directly to the conclusion that the United States had both the title to the land and the capacity to bring the action.

The opinion of Attorney-General Garland, *supra*, is to the same effect. Therein it was concluded that the allottees under the act of 1887 do not possess the right to cut and sell merchantable timber, except such as may be necessary to cut in clearing the land for agricultural or grazing purposes or to erect suitable buildings thereon. The learned trial judge referred to this opinion, saying that while it is not without force as applicable to the allotments in the

case at bar and while an opinion from such a source is strongly persuasive, he felt constrained to depart from it.

Before concluding this argument it may be well to refer briefly to the several cases mentioned in the opinion of the trial judge. The case of *Crews et al.* v. *Burcham et al.* (1 Black, 352) arose under the treaty of 1832 with the Pottawatomie tribe. By that treaty certain reservations of land were made for several individuals, which reservations were to be selected by the President of the United States and patents were to be issued therefor. There was no restriction on the power of alienation; indeed, the intention to give them an immediate title in fee simple was plain. The court held that such an individual could convey the equitable title pending the issue of patent.

In the case of *New York Indians* v. *United States* (170 U. S., 1) the treaty on its face granted to certain persons a title in fee simple. The only question was whether the grant was one in præsenti, and it was held that it was.

In the case of *Jones* v. *Meehan* (175 U. S., 1) certain reserved lands were by the treaty "hereby ceded" to certain chiefs of the tribe. It was there held that unless a treaty or act of Congress prohibited alienation, the individuals took a grant in fee.

Pine River Logging Co. v. *United States* (186 U. S., 279) was a case in which the Government brought suit for timber cut upon the Mississippi Chippewa Reservation and was defended on the ground that

the timber was taken under the statute allowing the Indians to sell "dead and down" timber. It appeared that while some of the timber cut and sold was of that character, a large part of it was green growing timber. It appears from the opinion of the court that it was conceded by all parties that the Indians have nothing more than a right of occupancy in their lands. By reference to the treaty (7 Stat., 565) it will be seen that the title given to the Indians was even greater than that given to the Stockbridge and Munsee Indians. The land could be alienated provided the transfer were approved by the Secretary of the Interior.

We respectfully submit that the judgment of the court below should be reversed.

MEASURE OF DAMAGES.

A further question arises as to the measure of damages. As the case was tried upon stipulated facts and a waiver of the jury it is presumed that the court, if the judgment below shall be reversed, will assess the damages. Unfortunately, the record is in such condition that the specific amount of money, under whatever rule the court may lay down, can not be ascertained, but we respectfully ask that the measure of damages be declared and the case remanded for further proceedings.

The complaint sets up the conversion of 7,500 feet of basswood, 6,500 feet of elm, and 51,020 feet of pine logs, of the value of $536. The complaint asks for judgment for this amount and the additional

amount of $15.14, being the amount necessarily incurred and actually expended in ascertaining the extent of trespass, measuring, and scaling, etc., with interest and costs. The defendant alleges in its answer that it in good faith bought and purchased of Gardner the amount of basswood logs mentioned in the complaint and 3,390 feet board measure of elm logs, which said logs were at the time of purchase landed on the bank at Weeds Point; that the said basswood logs were then and there of the value of $5.25 per thousand feet board measure and the said elm logs were then and there of the value of $4.50 per thousand feet board measure, and that said basswood logs and said elm logs were then and there at said place in the possession of Thomas Gardner, who then and there claimed and represented himself to be the sole and absolute owner thereof and entitled to sell the same. The answer further alleges that the defendant, in good faith, bought and purchased of Daniel Davids the amount of pine logs mentioned in the complaint, such logs being of the value of $6 per thousand feet board measure; that said logs were in the possession of Davids, who represented himself to be the sole and absolute owner thereof and entitled to sell the same.

The stipulation of facts contains these items:

> That the defendant, after the cutting of said logs and timber, the said basswood and elm logs then being on Weeds Point, in the county of Shawano, and off of said Indian lands, in good faith and for a valuable con-

sideraton, purchased the same of said Thomas Gardner, he claiming then and there to be the owner thereof and entitled to dispose of the same; and after the cutting of said logs and timber purchased the said pine logs of said Daniel Davids in good faith and for a valuable consideration, he then and there claiming to be the owner thereof and entitled to sell the same.

It is further stipulated and agreed, that if the defendant, on the facts and law herein stipulated and proved on the trial of this action, shall be held liable for the value of said logs and timber at the time of the taking thereof by it, or while the same are in its hands, that the sum of $566.28 shall be and hereby is fixed and agreed upon as the measure of damages therefor.

It is further stipulated and agreed that if the defendant, on the facts and law herein stipulated and proved on the trial of this action, shall be held liable for the value of said logs and timber at the time of the cutting thereof by the said Indians, or the value thereof at the time of the taking thereof by the defendant, less the additions in value made thereto by the said Indians in cutting, hauling, and banking the same, that then and in that case the measure of damages therefor shall be and is hereby stipulated to be the sum of $379.59.

As the case is not pressed here as to the logs cut from the selection of Thomas Gardner, the court will see that it is impossible to ascertain from the

record, upon any theory, the exact amount of damages for the timber cut upon the selection of Daniel Davids. As to the measure of damages we submit the following: This court in the Cook case held that the presumption is against the authority of the Indians to cut and sell the timber, and that every purchaser from them is charged with this notice of presumption, and to maintain his title it is incumbent upon him to show that the timber was rightfully taken from the land. The defendant in this case has added nothing to the value of the logs and timber. The enhanced value arises from the cutting, hauling, and banking the same at Weeds Point by the Indians. In the Pine River Logging Company case the court followed the rule laid down in *Woodenware Company* v. *United States*, 106 U. S., 432. In the Pine River case it was conceded that the Indians had only a right of occupancy in their lands, and the court held that as to the timber cut by the Indians, including green and growing timber, in excess of their authority, the defendant was liable for the value of the logs as they were banked upon the stream near where they were cut.

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